95-1440

Supreme Court, U.S.
F I L E D
MAR 6 1996
CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1995

PRESIDENT CONTAINTER, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

J. (Jay) David Fischer
Counsel of Record

FISCHER, WEISINGER, CALIGUIRE & PORTER
Attorneys for Petitioner
456 Sylvan Avenue
Englewood Cliffs, New Jersey 07632
(201) 569-5959 Telephone
(201) 871-4544 Telecopier

54 PK

QUESTIONS PRESENTED

1. Whether, in consideration of a Petition for Enforcement of a Decision and Order under the National Labor Relations Act, the Third Circuit misapprehended and misapplied the "contract bar rule" and/or the "accretion doctrine" by upholding a determination by the National Labor Relations Board certifying a bargaining unit consisting of mechanics since such employees have been covered by the terms of collective bargaining agreements spanning a thirty-year time period with another union.

2. Whether, in consideration of a Petition for Enforcement of a Decision and Order under the National Labor Relations Act, the Third Circuit misapprehended and misapplied the law by upholding a determination by the National Labor Relations Board certifying a bargaining unit consisting of mechanics as an appropriate bargaining unit, which determination was not supported by substantial evidence.

3. Whether, in consideration of a Petition for Enforcement of a Decision and Order under the National Labor Relations Act, the Third Circuit misapprehended and misapplied the "one year presumption" of majority support under Brooks v. N.L.R.B., 348 U.S. 96 (1954) by upholding a determination by the National Labor Relations Board requiring bargaining with the mechanics' unit prior to the decertification of the existing bargaining unit already covering these employees.

4. Whether, under the particular facts of the instant case, the "one year presumption" of majority support under Brooks v. N.L.R.B., 348 U.S. 96 (1954) should be modified to exclude from its application a situation where an employer in good faith fails to bargain with one unit, the putative members of which are, prima facie, covered by the terms of an existing collective bargaining agreement with another union.

5. Whether, under the particular facts of the instant case, the rule of the National Labor Relations Board announced in Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962), which tolls the "one year certification" period, unfairly penalizes an employer who in good faith fails to bargain with one unit, the putative members of which are, prima facie, covered by the terms of an existing collective bargaining agreement with another union.

LIST OF PARTIES

Petitioner:

President Container, Inc.

Respondent:

National Labor Relations Board

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a corporation closely held by individual shareholders, and there are no holding companies or subsidiaries thereof.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 7

REASONS FOR GRANTING THE WRIT 10

I. THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE "CONTRACT BAR RULE" AND THE "ACCRETION DOCTRINE" BY UPHOLDING A DETERMINATION BY THE NATIONAL LABOR RELATIONS BOARD CERTIFYING A BARGAINING UNIT CONSISTING OF MECHANICS SINCE SUCH EMPLOYEES HAVE BEEN COVERED BY THE TERMS OF COLLECTIVE BARGAINING AGREEMENTS SPANNING THIRTY YEAR 10

A. Petitioner's Collective Bargaining Agreements Bar Enforcement of the Respondent's Order 10

B. Even If Not Initially Included In The Existing Collective Bargaining Unit The Mechanics Accreted to The Existing Unit 12

II. THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING LAW BY UPHOLDING A DETERMINATION THAT THE MECHANICS CONSTITUTE AN APPROPRIATE BARGAINING UNIT 15

A. The Determination of the Appropriateness of the Bargaining Unit Was Unreasonable and Arbitrary 15

III. THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE "ONE YEAR PRESUMPTION" OF MAJORITY SUPPORT FOR A BARGAINING UNIT UNDER BROOKS V. N.L.R.B., 348 U.S. 96 (1954), BY UPHOLDING A DETERMINATION BY THE NATIONAL LABOR RELATIONS BOARD REQUIRING BARGAINING WITH THE MECHANICS' UNIT PRIOR TO THE DECERTIFICATION OF THE EXISTING COLLECTIVE BARGAINING UNIT 17

IV. BROOKS V. N.L.R.B., 348 U.S. 96 (1954), AND MAR-JAC POULTRY CO., 136 N.L.R.B. 785 (1962), SHOULD BE MODIFIED BY THIS COURT TO EXCLUDE FROM ITS APPLICATION A SITUATION WHERE AN EMPLOYER IN GOOD FAITH FAILS TO BARGAIN WITH A UNIT, THE PUTATIVE MEMBERS OF WHICH ARE, PRIMA FACIE, COVERED BY THE TERMS OF AN EXISTING COLLECTIVE BARGAINING AGREEMENT WITH ANOTHER UNION 19

CONCLUSION 21

APPENDIX A-1

TABLE OF AUTHORITIES

Page

Airco, Inc., 273 N.L.R.B. 348 (1984) 12, 14

American Publishing Co. of Michigan,
308 N.L.R.B. 563 (1992) 12

Borden, Inc. v. N.L.R.B., 19 F.3d 502,
(10th Cir. 1994) 12

Brooks v. N.L.R.B, 348 U.S. 96, 75 S.Ct. 176,
99 L.Ed 125 (1954) ..... i, iv, 8, 17, 18, 19, 20

Central Soya Co. v. N.L.R.B., 867 F.2d 1245
(10th Cir. 1988) 12

Consolidated Papers, Inc. v. N.L.R.B., 670 F.2d 754
(6th Cir. 1982) 12

General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962) 10

Local 467, Upholsterers' Intern'l Union v. N.L.R.B.,
419 F.2d 179 (3d Cir. 1969) 13

Mallincrodt Chemical Works, 162 N.L.R.B. 387 (1966) ... 12, 14

Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962) ..... i, iv, 8, 20

N.L.R.B. v. Bernard Gloekler North East Co., 540 F.2d 197
(3d Cir. 1976) 11

N.L.R.B. v. DMR Corp., 795 F.2d 472 (5th Cir. 1986) 12

N.L.R.B. v. Frick Co., 423 F.2d 1327 (3d Cir. 1970) 17, 19

N.L.R.B. v. Paper Manufacturers' Co., 786 F.2d 163
(3d Cir. 1986) 15

N.L.R.B. v. Security-Columbian Banknote Co.,
541 F.2d 135 (3d Cir. 1976) 12

N.L.R.B. v. St. Francis College, 562 F.2d 246
(3d Cir. 1977) 12, 14, 15

Pick - Mt. Laurel Corp. v. N.L.R.B., 625 F.2d 476
(3d Cir. 1980) 10, 17, 19

President Container, 315 N.L.R.B. No. 164 (1995) 7

Staten Island University Hosp. v. N.L.R.B., 24 F.3d 450
(2d Cir. 1994) 15

Super Valu Stores, Inc., 283 N.L.R.B. 134 (1987) 12

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474,
71 S.Ct. 456, 95 L.Ed. 456 (1951) 13

Vincent M. Ippolito, Inc., 313 N.L.R.B. 348 (1994) 12

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

PRESIDENT CONTAINTER, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, President Container, Inc. [hereinafter "President"], respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit filed in this proceeding on December 8, 1995.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit was filed December 8, 1995. That decision is not reported, but is reproduced at pages A1-10 of the Appendix to this Petition ("Pet. App."). The decision and order of the National Labor Relations Board (the "Board"), dated January 9, 1995, is reported at 315 N.L.R.B. No. 164. The Board's decision is reproduced at Pet. App. A12-18. The decision of the United States Court of Appeals for the Third Circuit, filed on December 8, 1995, denying summary enforcement to the Board is reproduced at Pet. App. A11.

Other relevant orders include the Certification of Representative of the National Labor Relations Board, Case No. 22-RC-10936, dated September 9, 1994, which is reproduced at Pet. App. A19-20; the Order of the National Labor Relations Board Denying Review of the Decision and Direction of Election of the Acting Regional

Director, Case No. 22-RC-10936, dated August 31, 1994, which is reproduced at Pet. App. A21; and the Decision and Direction of Election of the Acting Regional Director of the National Labor Relations Board, Case No. 22-RC-10936, dated August 1, 1994, which is reproduced at Pet. App. A22-26.

STATEMENTS OF JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was filed on December 8, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e).

The jurisdiction of the Court of Appeals for the Third Circuit was invoked pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e).

STATUTORY PROVISIONS INVOLVED

Section 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §158(a)(1) and (5) read in pertinent part:

> It shall be an unfair labor practice for an employer— (1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C. §157];. . . .(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. §159(a)].

Section 9(c) of the National Labor Relations Act, 29 U.S.C.§159(a) reads in pertinent part:

> Hearings on questions affecting commerce; rules and regulations. (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board— (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a) [subsec. (a) of this section], or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a) [subsec. (a) of this section]; or
>
> (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a) [subsec. (a) of this section]; the Board shall investigate such petition and if it has reasonable cause to believe that a question of repre-

sentation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10(c) [29 U.S.C. §160(c)].

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act [29 U.S.C. §§151-158, 159-169] in any election conducted within twleve months after the commencement of the strike. In any election where none of the choices on the ballots receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for

the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

STATEMENT OF THE CASE

This case initially involved the application of the Board to the United States Court of Appeals for the Third Circuit for enforcement of the Board's Decision and Order issued against President on January 9, 1995. President Container, 315 N.L.R.B. No. 164 (1995).

In its Decision and Order, the Board found that President unlawfully refused to bargain with Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R and 825H, International Union of Operating Engineers, AFL-CIO ("Local 825") in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1) ("the Act")). President concedes that it refused to bargain with Local 825 for the sole purpose of challenging the Board's erroneous certification of Local 825 as the bargaining representative for President's maintenance mechanics, boiler mechanics and garage mechanics (collectively, "the mechanics").

President manufactures corrugated boxes at its sole manufacturing facility in Moonachie, Bergen County, New Jersey. President's production staff consists of approximately 220 hourly machine operators, twelve hourly mechanics, seven or eight salaried foremen, and two or three salaried supervisors who are all under the supervision of Mr. Joseph Restifo, the plant manager. See Pet. App. A3.

President has had a collective bargaining relationship with Production Workers Local 148 ("Local 148") since the 1950's. Pet. App. A3. The current three-year bargaining agreement, dated March 10, 1993, which is another in the series of renewals of President's bargaining agreement with Local 148 since the 1950's, continues to define in Section 1 the unit represented by Local 148 and covered by the agreement: "all of [President's] employees, excluding office, clerical, supervisory, foremen, guards, and watchmen." Pet. App. A3. It is indisputable that the previous agreements contain the identical description and that the plain language of Section 1 includes within Local 148's representation the twelve mechanics at issue in this matter, as well as the other 220 hourly production workers.

On April 11, 1994, Local 825 filed a representation petition with the Board's Regional Office seeking to represent President's me-

chanics. Meanwhile, Local 148 filed an unfair labor practice charge on or about June 9, 1994, and charged President with failure to recognize the mechanics as being covered by the collective bargaining agreements between President and Local 148. Pet. App. A3.

On August 1, 1994, the Acting Regional Director issued a Decision and Direction of Election. Pet. App. A22. The Regional Director found that the mechanics were not covered by the existing collective bargaining agreement, that they had not been "accreted" to the production unit, and that they shared a distinct community of interest among themselves warranting treating them as a separate appropriate bargaining unit. The Regional Director, therefore, directed an election in the petitioned for unit, but gave Local 148 a mere 10 days to submit the requisite showing of interest in order to appear on the ballot. Pet. App. A26. The Board denied President's request for review. Pet. App. A21. After the election, the Regional Director certified Local 825 as the exclusive representative of the mechanics. Pet. App. A19.

On or about October 14, 1994, Local 825, by letter, requested President to bargain, and since that date President has declined. On November 14, 1994, the General Counsel of the Board issued a complaint, based on an unfair labor practice charge filed by Local 825, alleging that President violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by its refusal to bargain. Pet. App. A4. President filed an answer, and later an amended answer, admitting its refusal to bargain, but denying that Local 825 was properly certified by the Board. Thereafter, the General Counsel of the Board filed a motion for summary judgment, and President filed a memorandum in opposition. Pet. App. A13.

On January 9, 1995, the Board issued its Decision and Order, granting the General Counsel's motion for summary judgment and finding that President's refusal to bargain violated the Act. Pet. App. A12. Despite the collective bargaining history with Local 148 and the petition by mechanics disavowing interest in Local 825, the Board held, in reliance on Brooks v. N.L.R.B., 348 U.S. 96 (1954), that Local 825 had a one-year certification period. Pursuant to Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962), the Board tolled the commencement of the one-year certification period until President commenced to bargain in good faith with Local 825. The Board's Order requires President to recognize and bargain collec-

tively with Local 825 on request, to embody any understanding reached in a signed agreement, and to post a remedial notice. Pet. App. A16-18.

To obtain compliance with its Order, the Board filed a Petition for Enforcement with the Clerk of the Court of Appeals for the Third Circuit on April 18, 1995, Pet. App. A2, along with a Motion for Summary Enforcement. Respondent filed a Memorandum in Opposition to the Motion of Summary Enforcement on May 9, 1995, and the Motion was denied on June 7, 1995. Pet. App. A11. The Board filed the agency record with the Clerk of the Court of Appeals for the Third Circuit, thereby conferring exclusive jurisdiction upon the Court of Appeals.

The Court of Appeals, by Opinion filed December 8, 1995, granted the Board's Petition and the enforcement of the Board's Order in all respects. Pet. App. A1. President then filed this Petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE "CONTRACT BAR RULE" AND THE "ACCRETION DOCTRINE" BY UPHOLDING A DETERMINATION BY THE NATIONAL LABOR RELATIONS BOARD CERTIFYING A BARGAINING UNIT CONSISTING OF MECHANICS SINCE SUCH EMPLOYEES HAVE BEEN COVERED BY THE TERMS OF COLLECTIVE BARGAINING AGREEMENTS SPANNING THIRTY YEARS.

A. Petitioner's Existing Collective Bargaining Agreement Bars Enforcement of the Respondent's Order.

Local 148 and President have had a collective bargaining relationship since the 1950's. It is undisputed that Section I of the existing agreement (and provisions of past agreements) defines the unit of employees represented by Local 148 as "all of [President's] employees, excluding office, clerical, supervisory, foremen, guards, and watchmen." Pet. App. A3. This plain language, therefore, cannot be questioned without running afoul of the "contract bar rule." The contract bar rule raises an irrebuttable presumption that an existing bargaining representative maintains majority support of the unit and bars an election within the unit during the term of a collective bargaining agreement (which has a duration of no more than three years). See Pick - Mt. Laurel Corp. v. N.L.R.B., 625 F.2d 476, 480 (3d Cir. 1980); General Cable Corp., 139 N.L.R.B. 1123, 1125 (1962). Because the current contract between President and Local 148 runs until 1996, this rule mandates that no challenge could be made to Local 148's status as representative of "all of [President's] employees, excluding office, clerical, supervisory, foremen, guards, and watchmen" during the tenure of the existing

agreement, whether by President, the mechanics, Local 825, or any other union. See id.

The only basis relied upon by the Court of Appeals to support its departure from this rule appears to be that President's president never considered the mechanics to be covered by its agreements with Local 148. In fact, however, the uncontroverted testimony establishes that President applied provisions of the collective bargaining agreement to the mechanics, including such provisions as holidays, vacation, safety, military leave, and discharge. Moreover, the mechanics work with the other hourly production workers on the same shifts and, when business warrants, the same overtime. They respond to the same shift foreman and plant manager and punch the same time clock. The decision to hire and fire is made by the same plant manager who uses the procedures established by the contract. Critically, the record is completely barren of evidence indicating how the mechanics' wages and other benefits substantively differ from those provided for in the contract with Local 148.

More telling, however, is that the opinion of President's president in this regard is simply beside the point. It is the text of the agreement with Local 148 which is of legal effect, not the opinion of an officer of President. Indeed, the uncontradicted testimony of Mr. Robert Gajewski, Local 148's Secretary-Treasurer and veteran field representative, showed that Local 148 always considered the mechanics to be part of the unit, was outraged that President did not, and filed an unfair labor practice charge upon the discovery that President did not. See Pet. App. 3.

The contract with Local 148, which contains a grievance and arbitration provision to resolve disputes, is not rendered unenforceable by a unilateral mistake by one of the parties as to whether the mechanics were covered thereby. For the Court of Appeals to refuse, in effect, to afford the contract with Local 148 the dignity of the contract bar rule on such a basis was clearly erroneous. In addition, the effect of such refusal is to frustrate the general purpose of the National Labor Relations Act of minimizing industrial strife by encouraging collective bargaining. See N.L.R.B. v. Bernard Gloekler North East Co., 540 F.2d 197, 198 (3d Cir. 1976) (contract bar rule serves to preserve industrial stability and support integrity of lawful contract terms); 29 U.S.C. §151.

B. Even If Not Initially Included In the Existing Collective Bargaining Unit, the Mechanics Accreted to the Existing Unit.

An accretion is "the incorporation of [a small group of] employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity." N.L.R.B. v. Security-Columbian Banknote Co., 541 F.2d 135, 140 (3d Cir. 1976); see Borden, Inc. v. N.L.R.B., 19 F.3d 502, 508 (10th Cir. 1994); Central Soya Co. v. N.L.R.B., 867 F.2d 1245, 1248 (10th Cir. 1988); Consolidated Papers, Inc. v. N.L.R.B., 670 F.2d 754, 757 (6th Cir. 1982); Super Valu Stores, Inc., 283 N.L.R.B. 134 (1987). Also relevant in this regard are the Board's policies, including its policy in favor of plant-wide units and its policy disfavoring severing units by crafts or other classifications, American Publishing Co. of Michigan, 308 N.L.R.B. 563 (1992); Mallincrodt Chemical Works, 162 N.L.R.B. 387 (1966); see Vincent M. Ippolito, Inc., 313 N.L.R.B. 715 (1994), as well as the policy of avoiding the creation of residual units if possible. Airco, Inc., 273 N.L.R.B. 348 (1984).

While the determination of an accretion issue is committed to the Board's discretion, its determination shall be set aside when the Board acts in an unreasonable and arbitrary manner. N.L.R.B. v. St. Francis College, 562 F.2d 246, 249 (3d Cir. 1977); Borden, Inc., 19 F.3d at 508, citing Central Soya Co., 867 F.2d at 1247. Arbitrary action is demonstrated when the Board's order is inconsistent with its declared policy. Consolidated Papers, 670 F.2d at 757. The proper test is whether the difference between the communities of interests of the mechanics and the other hourly production workers represented by Local 148 "is so great as to indicate that [the mechanics] constitute an appropriate unit separate from [the other unit]." N.L.R.B. v. DMR Corp., 795 F.2d 472, 476 n.4 (5th Cir. 1986). The Board, in this matter, failed the test and the Court of Appeals should have so found.

First, the uncontroverted evidence before the Board was that the mechanics were "new" to the collective bargaining relationship between Local 148 and President, which relationship was first established in the 1950's. President did not have boiler mechanics until about 1965, which was when the first corrugator equipment was purchased, and the garage mechanics and maintenance me-

chanics came on board in the early 1970's. Moreover, Local 148 always considered itself to be the representative of a bargaining unit that included the mechanics. There clearly was no substantive, "historical exclusion" of the mechanics from the other hourly production workers.

In upholding the Board's decision that the mechanics did not accrete to the existing bargaining unit, the Court of Appeals apparently ignored this evidence, virtually the only evidence in this regard before the Board, implicitly finding that the mechanics had a distinct existence at the inception of the agreement and were intentionally excluded. Pet. App. A6. In so doing the Court of Appeals clearly "misapprehended or grossly misapplied" the standard of appellate review, i.e., whether there is substantial evidence to support the Board's decision on the record as a whole, thereby mandating the instant Petition for review. See Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

Additionally, the Board simply stated its conclusions without discussion or explanation. For example, the Board concluded that the mechanics do not enjoy contractual wages, increments, and bonuses. Yet, there is no evidence in the record to even suggest the Board actually compared wages, increments, and bonuses between the mechanics and the other hourly production workers to determine whether there was actually a difference. Indeed, the contract with Local 148 is totally silent as to established hourly wage rates and seniority-based increments. Similarly, there can be no dispute that the mechanics did not receive health, welfare, and pension benefits pursuant to the collective bargaining agreement between President and Local 148. Absent from the record, however, is any evidence from which one can conclude that the benefits received by the mechanics are in fact different in substance. This failure by the Board and the Third Circuit to articulate actual, substantive differences is a failure to explain its decision, a hallmark of abused discretion. Indeed, the Court of Appeals cannot review the Board's exercise of discretion when the Board offers no explanation for its action. "To do so would be tantamount to this Court substituting its discretion for the Board's." Local 467, Upholsterers' Int'l Union v. N.L.R.B., 419 F.2d 179, 182 (3d Cir. 1969) (in making unit determination, Board abused discretion by placing sole reliance on collective bargaining history and degree of union organization).

The other factors actually discussed and purportedly relied upon by the Court of Appeals again miss the point. Far from being intentionally excluded from the agreement with Local 148, at its inception, the mechanics only gradually joined President's workforce over the subsequent two decades. The evidence of this chronology alone admits of no conclusion other than accretion of the mechanics into the existing collective bargaining unit.

The Board's and Third Circuit's conclusion that the mechanics' "special skills" militate against accretion is really an unspoken attempt to sever the accreted mechanics from the existing bargaining unit by reason of craft. Yet, the Board's own policy is to reject severance of crafts from a plant-wide unit. Airco, Inc., 273 N.L.R.B. 348 (1984); Mallincrodt Chemical Works, 162 N.L.R.B. 387 (1966). Remarkably, the Board makes no attempt to explain the departure in this case from its long-standing policy. The Third Circuit, in lock-step with the Board, improperly concentrated on the few differences between the mechanics and the other hourly production workers and ignored the community of interests. See N.L.R.B. v. St. Francis College, 562 F.2d 246, 249 (3d Cir. 1977). The determination by the Court of Appeals that the foregoing constitutes substantial evidence supporting the Board's decision represents a gross misapplication of the applicable standard of review.

II.

THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE CONTROLLING LAW BY UPHOLDING A DETERMINATION THAT THE MECHANICS CONSTITUTE AN APPROPRIATE BARGAINING UNIT.

A. The Determination of the Appropriateness of the Bargaining Unit Was Unreasonable and Arbitrary.

The determination of an appropriate bargaining unit depends upon "the degree to which the petitioned for employees share a community of interests distinct from their interests as employees of the whole institution." Staten Island University Hosp. v. N.L.R.B., 24 F.3d 450, 454 (2d Cir. 1994). The factors and policies used in making the determination are the same as those considered in determining whether an accretion has occurred. See N.L.R.B. v. Paper Manufacturers' Co., 786 F.2d 163, 167 (3d Cir. 1986); N.L.R.B. v. St. Francis College, 562 F.2d 246, 249 (3d Cir. 1977). The primary difference is that unit determination requires a "substantial community of interests" while accretion requires an "overwhelming community of interests." Staten Island University Hosp., 24 F.3d at 455. Again, while the Board enjoys discretion to pick from the myriad of possibilities, its decision will not stand when the decision, as in this matter, is arbitrary and unreasonable. Id.; St. Francis College, 562 F.2d at 249.

In this case, the Board and the Third Circuit unaccountably chose to select minute items that separate the mechanics from the other hourly production workers, whereas an "objective description" of the jobs here would reveal no real differences, other than "minor fringe benefits." See N.L.R.B. v. St. Francis College, 562 F.2d 246, 252 (3d Cir. 1977) (enforcement of order "fragmentizing" Franciscan and lay faculty members denied). Critically missing from the analysis is substantial evidence that the mechanics share a community of interest, inter sese, as opposed to their interest as

members of the larger community of employees of President. The actual difference in roles fixed upon by the Court of Appeals, i.e., the repair of machinery as opposed to its operation, is, fundamentally, a distinction without a difference. There would be as much merit in differentiating between those employees who manufacture the product and those who package or ship it. The decision of the Court of Appeals, based as it is upon such distinctions, is both unreasonable and arbitrary.

In any event, there is no evidence that the mechanics have similar terms and conditions of their employment nor a history of bargaining as a separate mechanics' unit. Moreover, the so-called "special skills" ascribed to the mechanics by the Board are quite different among the three groups, in that, for example, the boiler mechanics must have state licenses and the maintenance mechanics must have electrical skills.

Most significantly, the record is devoid of <u>any</u> evidence of interchange among nor functional integration of the mechanics. There is simply no evidence to even suggest that the boiler mechanics work on the machines or in the garage, that the maintenance mechanics work on the boiler, etc. Indeed, the Board and the Third Circuit totally ignored the fact that each separate group of mechanics interfaced most often with the other production workers.

The evidence shows a sharing of interests among the mechanics that is limited, but not substantial. They punch the same time clock, have the same holidays, and work under the supervisory control of the plant manager. These interests, however, are not "separate and apart" from the other hourly production workers. The mechanics have the same medical and 401(k) plans, but these interests are not separate and apart from President's other non-production employees. Indeed, the only evidence of a shared interest, separate and apart from all of President's employees, may be that they own their own hand tools.

It is clear that there is no substantial evidence to support the Board's unit determination for the mechanics. Without such evidence, the Board's order could not and should not have been enforced by the Court of Appeals. The Court of Appeals clearly misapprehended and misapplied the controlling law when it upheld this determination.

III.

THE THIRD CIRCUIT MISAPPREHENDED AND MISAPPLIED THE "ONE YEAR PRESUMPTION" OF MAJORITY SUPPORT FOR A BARGAINING UNIT UNDER BROOKS V. N.L.R.B., 348 U.S. 96 (1954), BY UPHOLDING A DETERMINATION BY THE NATIONAL LABOR RELATIONS BOARD REQUIRING BARGAINING WITH THE MECHANICS' UNIT PRIOR TO THE DECERTIFICATION OF THE EXISTING BARGAINING UNIT.

The Court of Appeals determined that Local 825 enjoys a one-year "irrebuttable presumption" of majority support, and relies for support upon this Court's seminal decision in Brooks v. N.L.R.B., 348 U.S. 96, 75 S.Ct. 176, 99 L.Ed. 125 (1954) (Frankfurter, J.). This presumption, however, in Justice Frankfurter's own words, "has special pertinence only to the period during which a second election is possible." Id. at 104, 75 S.Ct. at 181 (emphasis added). Moreover, the Court of Appeals itself has recognized that the "irrebuttable presumption" is not absolute. See Pick - Mt. Laurel Corp. v. N.L.R.B., 625 F.2d 476, 479-80 (3d Cir. 1980) (referring to the rule announced in Brooks as creating an "almost" irrebuttable presumption).

As set forth above, Local 148 long represented the mechanics as well as the other hourly production workers, and under the contract bar rule, see supra, Local 148 is presumed to have majority support of the entire unit. This being the case, no "second election" is possible until Local 148 is decertified or a unit clarification petition is filed and adjudicated.

Moreover, the "irrebuttable presumption" was born from the "weighing of two conflicting goals of national labor policy: preserving employees' free choice of bargaining representatives, and providing stability for established bargaining relationships." Pick - Mt. Laurel Corp., 625 F.2d at 480 (quoting N.L.R.B. v. Frick Co., 423 F.2d 1327, 1332 (3d Cir. 1970)). In this case, these policies are

not in conflict. By the petition of October 24, 1994, (see infra), the mechanics have manifested their desire not to be represented by Local 825, and the bargaining relationship that needs stability, and that merits judicial protection, is the one which President has long had with Local 148. Indeed, compelling President to bargain with Local 825 would be contrary to both policies.

For the reasons stated above, the Court of Appeals misapprehended and misapplied the rule in Brooks by extending its protection to Local 825.

IV.

BROOKS V. N.L.R.B., 348 U.S. 96 (1954), AND MAR-JAC POULTRY CO., 136 N.L.R.B. 785 (1962) SHOULD BE MODIFIED BY THIS COURT TO EXCLUDE FROM ITS APPLICATION A SITUATION WHERE AN EMPLOYER IN GOOD FAITH FAILS TO BARGAIN WITH A UNIT, THE PUTATIVE MEMBERS OF WHICH ARE, PRIMA FACIE, COVERED BY THE TERMS OF AN EXISTING COLLECTIVE BARGAINING AGREEMENT WITH ANOTHER UNION.

As set forth above, President has had a bargaining relationship with Local 148 that goes back for several decades. The plain language of the collective bargaining agreement between President and Local 148 includes within the coverage thereof the mechanics whose representation is here at issue. This is undisputed.

It is equally undisputed that such agreement remains in full force and effect and is entitled to the dignity of judicial enforcement. It cannot be seriously contended that, absent the advent of Local 825, President would not be legally compelled to include the mechanics in its bargaining with Local 148.

Furthermore, in this matter, the employer was presented, on October 24, 1994, shortly after the Local 825 certification election, with a notarized petition on behalf of nine of the twelve mechanics, disassociating themselves from Local 825.

As discussed herein, the one-year presumption of majority support of a bargaining unit enunciated in Brooks had its genesis in the "...weighing of two conflicting goals of national labor policy: preserving employees' free choice of bargaining representatives, and providing stability for established bargaining relationships." Pick-Mt. Laurel Corp. 625 F.2d at 480 (quoting N.L.R.B. v. Frick Co., 423 F.2d 1327, 1332 (3d Cir. 1970). In the instant case, the achievement of both these goals is jeopardized by cloaking Local 825 with the protection of the Brooks presumption in the face of all

of the evidence mandating a contrary conclusion.

Moreover, The Board's rule in Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962), penalizes President for taking the only route available to challenge the Board's erroneous unit determination. The Third Circuit's characterization of the rule as "the Board's standard remedy", Pet. App. A10, ignores the reality President now faces, i.e., taking precious time to bargain with a union local, Local 825, which has already lost the majority support of the unit.

An employer may refuse to bargain with a certified union when it reasonably believes, in good faith, that the union has lost the majority support of the designated unit. Under the circumstances of this case, an employer's good faith in refusing to bargain with Local 825 would be beyond cavil.

To the extent that the holding in Brooks and the rule in Mar-Jac apply to this situation and operates to vary this result, its effect is to impair the achievement of the "...two conflicting goals of national labor policy..." as aforesaid. Brooks and Mar-Jac were decided in an era of American economic prosperity and hegemony. Even if they were reasonable constructions of Congressional intent in their day, they have no place in the real world in their current form. In today's world of international economic competitiveness, a world in which small businesses such as President struggle, the maintenance of old-fashioned, economically inefficient rules is arbitrary and unreasonable and can no longer command the sanction of this Court. Accordingly, President respectfully requests that Brooks and Mar-Jac be modified.

CONCLUSION

For the foregoing reasons, President respectfully prays that its petition for a writ of certiorari be granted.

Respectfully submitted,
FISCHER WEISINGER CALIGUIRE
& PORTER
456 Sylvan Avenue
Englewood Cliffs, NJ 07632
(201) 569-5959

Dated: March 6, 1996 By: _____
J. (Jay) David Fischer
A Member of the Firm

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3225

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PRESIDENT CONTAINER, INC.,
Respondent

On Application of the National Labor Relations Board
for Enforcement of an Order
(NLRB Docket No. 22-CA-20240 (1))

Before: SLOVITER, Chief Judge, STAPLETON and
SAROKIN, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the National Labor Relations Board and was submitted pursuant to Third Circuit LAR 34.1(a) on December 4, 1995.

On consideratin whereof, it is now here ordered and adjudged by this Court that the Application of the National Labor Relations Board for Enforcement of the Order issued on January 9, 1995, and the same is, hereby granted. Costs taxed against respondent.

Attest:

P. Douglas Sisk
Clerk

Dec. 8, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 95-3225

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

PRESIDENT CONTAINER, INC.,
Respondent

On Application of the National Labor Relations Board
for Enforcement of an Order
(NLRB Docket No. 22-CA-20240 (1))

Submitted Pursuant to Third Circuit LAR 34.1(a)
December 4, 1995

Before: SLOVITER, Chief Judge, STAPLETON and SAROKIN, Circuit Judges
(Filed Dec. 8, 1995)

MEMORANDUM OPINION

SLOVITER, Chief Judge.

The National Labor Relations Board has applied for enforcement of its January 9, 1995 order directing respondent President Container, Inc. (Company) to bargain with Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R and 825H of the International Union of Operating Engineers (Local 825), the elected representa-

tive of the Company's maintenance mechanics, garage mechanics and boiler men. This court has jurisdiction pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. §160(e).

I.

President Container, located in Moonachie, New Jersey, manufactures corrugated boxes. The Company and Production Workers Union, Local 148 has had a collective bargaining relationship with President since the late 1950s, and currently represents approximately 220 of its production employees. The most recent collective bargaining agreement, effective March 10, 1993 through March 9, 1996, defines the collective bargaining unit as "all of [President's] employees, excluding office, clerical, supervisory, foremen, guards and watchmen." App. at 11. Although the language of the Agreement would seem to include the company's maintenance mechanics, garage mechanics, and boiler men (collectively "mechanics"), the Board contends these employees have historically been excluded from the Agreement.

On April 11, 1994, Local 825 filed a petition with the Board's regional office seeking to represent President's mechanics. On June 9, 1994, Local 148 filed an unfair labor practice charge accusing the Company of failing to recognize the mechanics as union members covered by its Agreement. After a hearing, the Board's Acting Regional Director issued a Decision and Direction of Election on August 1, 1994 concluding that the mechanics were not covered by the existing Agreement, that they had not "accreted" to the production unit, and that they shared a distinct community of interest warranting their certification as a separate bargaining unit. App. at 283-87. The unit certified was:

> All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by the Employer at its Moonachie, New Jersey facility but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

App. at 283.

The Director found that despite the long-standing bargaining relationship between Local 148 and the Company, the contract was never applied to these employees at any time during the preceding 20 years. The decision accordingly directed an election, and permitted Local 148 to submit a showing of interest within 10 days if it wished to appear on the ballot, which it failed to do. The Board conducted an election on September 1, 1994, and a majority of the approximately 14 mechanics in the proposed unit voted for representation by Local 825. On about October 14, 1994, Local 825 asked the Company to bargain; since then the Company has refused. A week later, a majority of mechanics signed a petition stating that they no longer wished to be represented by Local 825. On October 25, 1994, Local 825 filed an unfair labor practice charge, and on November 1, 1994 the Board issued a complaint alleging that the Company had violated Sections 8(a) (5) and (1) of the NLRA by refusing Local 825's request to bargain following the unit's certification.

On January 9, 1995, the Board issued its Decision and Order concluding that the Company had violated the NLRA and ordered it to bargain with Local 825 as the exclusive representative of the mechanics. The Board refused to reconsider the representation issues because they "were or could have been litigated in the prior presentation proceeding," and the Company did not offer any previously unavailable evidence or allege special circumstances that would warrant reexamination of the Board's previous decision on representation. App. at 5. The Board then filed this Petition for Enforcement.

II.

Section 9(b) of the NLRA, 29 U.S.C. § 159(b), empowers the Board to determine "the unit appropriate for the purposes of collective bargaining" in each case "in order to assure employees the fullest freedom in exercising the rights guaranteed by [the Act]." The selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision should rarely be disturbed. South Prairie Constr. Co. v. Local 627, Int'l Union of Operating Eng'rs, 425 U.S. 800, 805 (1976). We review the Board's determination of the scope of a collective bargaining unit

to insure that the exercise of the agency's discretion is not unreasonable, arbitrary, or in conflict with congressional intent. St. John's Gen. Hosp. of Allegheny-ADR Ctr. v. NLRB, 825 F.2d 740, 743 (3d Cir. 1987). We review the Board's factual findings to determine whether they are supported by substantial evidence on the record as a whole. Local 30, United Slate, Tile & Composition Roofers v. NLRB, 1 F.3d 1419, 1422 (3d Cir. 1993). In this case, the Company concedes that it refused to bargain with Local 825, but insists that its refusal was justified because the Board's certification of Local 825 violated the contract-bar rule, which bars an election petition while a contract is in effect, but for no longer than three years. Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476, 480 (3d Cir. 1980). Of course, the contract-bar rule applies only to employees covered by the terms of the collective bargaining agreement. Millbrook, Inc., 204 N.L.R.B. 1148, n.2 (1973).

Despite the facial breadth of the unit set forth in the Company's Agreement with Local 148, the record supports the Board's conclusion that the mechanics have never been parties to that Agreement. At the representation hearing, the Company's President Marvin Grossbard admitted he never considered the mechanics union members. App. at 172. He conceded that the Company never bargained over their wages, never provided them wage increases mandated by the contract, never deducted union dues from their earnings, never contributed to Local 148's pension fund on their behalf, never provided mechanics the dental or eyeglass coverage provided by the Agreement, and did not pay them contractually mandated bonuses. Instead, the mechanics individually negotiated wage increases, had their own health plan distinct from production employees, and contributed to their own 401(k) plans.

Maintenance mechanic Francisco Lopez corroborated Grossbard's testimony concerning the mechanics' wages and benefits, and testified that plant manager Joe Restifo had specifically told him there was no union for mechanics. Lopez also testified that none of Local 148's shop stewards ever invited him to join the union, attend union meetings, participate in contract negotiations, or pay union dues until after Local 825 sought to organize the mechanics. This testimony amply supports the Board's finding that the mechanics were historically excluded from the Agreement. Consequently, the contract-bar rule is not applicable.

The Company next maintains that the mechanics "accreted" to the existing unit of production employees. We have previously explained that "an accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate unit identity. Thus, they are properly governed by the larger group's choice of bargaining representative." NLRB v. Security-Columbian Banknote Co., 541 F.2d 135, 140 (3d Cir. 1976). The Board strictly limits application of the accretion doctrine because an accretion denies the accreted employees a vote on their choice of bargaining representative. Id.; NLRB v. DMR Corp., 795 F.2d 472, 476 (5th Cir. 1986); Local 627, Int'l Union of Operating Eng'rs v. NLRB, 595 F.2d 844, 851 (D.C. Cir. 1979).

The Company relies on the statements in cases referring to factors such as integration of operations, centralization of managerial and administrative control, and geographic proximity in determining whether an accretion has occurred. See, e.g., Security-Columbian, 541 F.2d at 140. Nonetheless, the Board has made it clear that it will not find an accretion where the group of employees in question had a distinct existence at the time the contract was executed and there is no evidence that the contract was intended to include them. NLRB v. Stevens Ford, Inc., 773 F.2d 468, 474 (2d Cir. 1985). Accordingly, the Board will find no accretion where the employees to be added were present prior to the proposed accretion but were excluded from the original unit and from selection of the bargaining representative. Teamsters Nat'l UPS Negotiating Comm. v. NLRB, 17 F.3d 1518, 1524 (D.C. Cir. 1994), cert. denied, ____ U.S. ____, 115 S. Ct. 722 (1995); Local 144, Hotel, Hospital, Nursing Home & Allied Services Union v. NLRB, 9 F.3d 218, 223-24 (2d Cir. 1993); Laconia Shoe Co., 215 N.L.R.B. 573, 576 (1974); King Radio Corp., 257 N.L.R.B. 521, 526 (1981).

Here, the Board's Acting Regional Director concluded that the mechanics had not accreted to the existing bargaining unit represented by Local 148 because the mechanics share a distinct community of interest with each other that differentiates them from the other employees. In its brief order denying review, the Board "noted[d] in agreement with the Acting Regional Director that because such employees have been historically excluded from the unit, they cannot be added by means of accretion." App. at 288.

The Company challenges the finding that there was historical exclusion of the mechanics, but, as we have already noted, the evidence strongly supports the Board's conclusion that the mechanics were in fact excluded from the larger production workers' bargaining unit. See King Radio, 257 N.L.R.B. at 526. Indeed, the mechanics were excluded from Local 148 for at least 20 years. In light of that evidence, the Board's conclusion that the mechanics did not "accrete" to the unit is certainly neither arbitrary nor unreasonable.

The most difficult question before us is whether the mechanics constitute an appropriate bargaining unit. When considering this question we are concerned with the community of interests of the employees involved. Peter Kiewit Sons' Co., 231 N.L.R.B. 76, 76-77 (1977), aff'd by Local 627, Int'l Union of Operating Eng'rs v. NLRB, 595 F.2d 844 (D.C. Cir. 1979). The factor we weight in assessing whether the mechanics share a community of interest include: (1) similarity of working conditions, skill and functions; (2) integration of operations; (3) frequency of contact or interchange among employees; (4) common supervision and determination of labor-relations policy; (5) history of collective bargaining; and (6) extent of union organization. See Robert A. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 69 (1976); NLRB v. Paper Mfts. Co., 786 F.2d 163, 167 (3d Cir. 1986). In evaluating the Board's unit determination, we do not inquire whether the Board certified the most appropriate bargaining unit, but rather whether it chose an appropriate unit. St. John's Gen. Hosp., 825 F.2d at 744.

The Company contends that the Board arbitrarily relied upon insubstantial differences between the mechanics and production employees to conclude that the mechanics constituted an appropriate bargaining unit. However, the record demonstrates significant differences in the roles, skills, work conditions and bargaining history between mechanics and production employees. The role of production employees is to operate the machinery, while mechanics are hired to repair and maintain it. There is little interchange between the maintenance and production functions. Mechanics and production workers have different supervisors and limited daily contact. Although maintenance mechanics interact more regularly with production workers than do boiler and garage mechanics, they

also have a separate work area. Each group of mechanics also has its own locker room separate from production employees. Significantly, the record contains no evidence of employees transferring from a job as a mechanic to one as a production worker, or the reverse.

The testimony also supports the Acting Regional Director's findings that mechanics have skills and conditions of employment distinct from the production workers and that they share some community of interest among themselves. There was evidence that, unlike most production employees, mechanics require prior mechanical skills or experience, use and often purchase their own hand tools, operate the Company's larger machine tools, and wear distinctive uniforms. As set forth above, bargaining history and employment benefits differ significantly between mechanics and production workers. Considered as a whole, the record contains sufficient evidence to support a finding that mechanics and production employees serve distinct roles and operate under different terms of employment.

The Company emphasizes that the different groups of mechanics work in different parts of the plant and have little daily contact with one another during the course of their work. It argues that this absence of regular interaction shows that the mechanics lack a community of interests. However, the mechanics, although admittedly performing their work in separate parts of the plant, do share the common function of repairing and maintaining the Company's machinery and equipment. Further, they share a common bargaining history and similar employment benefits.

In determining the appropriateness of a bargaining unit we need not find that all relevant factors point in one direction. "As in most unit-determination cases, the facts may be read with different emphases, leading to different results." Laidlaw Waste Systems, Inc. v. NLRB, 934 F.2d 898, 899 (7th Cir. 1991). See Gorman, at 69 ("[C] community of interest is . . . a multi-factor criterion, and it is rare in any given case that all of the factors point conveniently in the direction of the same size unit."); International Ass'n of Machinists and Aerospace Workers v. NLRB, 759 F.2d 1477, 1480 (9th Cir. 1985) ("[T]he Board must consider the entire factual situation, and its discretion is not limited by a requirement that its judgment be supported by all, or even most, of the potentially

relevant factors."). In this case, although certainly not all factors favor the Board's unit determination, we find substantial evidence on the record as a whole to support the finding that the mechanics constitute an appropriate bargaining unit.

The Company makes several additional arguments against a mechanics' unit based on Board policies, none of which are dispositive in this context. First, it refers to the Board policy that a plant-wide employee unit is presumptively appropriate. But because this is merely a presumption, it does not preclude a finding of smaller units. NLRB v. Carson Cable TV, 795 F.2d 879, 886-87 (9th Cir. 1986); NLRB v. First Management, Inc. 777 F.2d 330, 334 (6th Cir. 1985).

The Company next refers to the Board policy articulated in Mallinckrodt Chemical Works, 162 N.L.R.B. 387 (1966), disfavoring severing units by crafts or other classifications. However, the policy which the Board enunciated in that case addresses the severing of craft units from an existing larger unit which included the craft employees. It is inapplicable where there is no established bargaining history. See 1, The Developing Labor Law 467 (Patrick Hardin et al. eds., 3d ed. 1992); Vincent M. Ippolito., 313 N.L.R.B. 715, n.2 (1994), enforced, 54 F.3d 769 (3d Cir. 1995).

The Company also cites the Board's policy against creation of residual units. See Airco, Inc., 273 N.L.R.B. 348, 349 (1984). However, we have noted that sufficient evidence supports the conclusion that the mechanics share a community of interests among themselves distinct from other employees. Therefore the unit is not "residual" and does not conflict with Board policy.

Finally, the Company contends that it need not bargain with Local 825 because the union lacks majority status. Although it acknowledges that within the first year after an election a union enjoys a virtually irrebuttable presumption of majority status, Brooks v. NLRB, 348 U.S. 96 (1954), it maintains that the presumption has been rebutted in this case because nine of the mechanics signed a petition disassociating themselves from Local 825. This argument is directly contrary to the Supreme Court's holding in Brooks approving the Board's rule requiring employers to bargain with a newly certified union for one year. Thus no new election may be held during that time notwithstanding that an employer has been presented with evidence that the union has lost the support of its

membership. See id. at 103.

In its decision ordering the Company to bargain with Local 825, the Board construed the initial period of Local 825's certification as "beginning the date [President] begins to bargain in good faith with the Union." App. at 6. The Company contends this construction unfairly penalizes it for exercising its only means for obtaining judicial review of the Board's unit determination. The order, however, is not a penalty; rather, it is the Board's standard remedy to ensure that a newly-certified union receives one year of actual bargaining from the date of its certification. Inability to grant such relief would allow an employer "to take advantage of its own failure to carry out its statutory obligation, contrary to the very reasons for the establishment of the rule that a certification requires bargaining for at least 1 year." Mar-Jac Poultry Co., 136 N.L.R.B. 785, 787 (1962). See also Commerce Co., 140 N.L.R.B. 226, 229 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964). The remedy adopted in Mar-Jac has been approved and enforced by numerous courts. See, e.g. NLRB v. Best Products Co., 765 F. 2d 903, 914 (9th Cir. 1985); Local Union No. 2338, Int'l Bhd of Elec. Workers v. NLRB, 499 F.2d 542, 544 (D.C. Cir., 1974); Knapp-Sherrill Co. v. NLRB, 488 F.2d 655, 658 (5th Cir.), cert. denied, 419 U.S. 829 (1974). We agree with these courts that the Board's remedy is appropriate, and in this case will properly ensure that Local 825 receives the full year of collective bargaining to which it is entitled.

III.

For the foregoing reasons, we will enforce the Board's order in all respects.

TO THE CLERK:

Please file the foregoing opinion.

Dolores K. Sloviter
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3225

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

PRESIDENT CONTAINER, INC,
Respondent

(N.L.R.B. #22-CA-20240 (1))

Present: BECKER, HUTCHINSON and ALITO, Circuit Judges.

Motion by the National Labor Relations Board
for Summary Enforcement,

Copy of the Clerk's 5/5/95 order granting respondent's motion for an extension of time to file their response to 5/9/95, and respondent's response to the Board's motion.

Rita Golden 597-3080
Deputy Clerk

ORDER

The foregoing motion is denied.

Edward R. Becker
By the Court,
Circuit Judge

Dated: Jun 7, 1995

Notice: This opinion is subject to formal revision before publication in the Board volumes of NLRB decision. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

President Container, Inc. *and* Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R, and 825H, International Union of Operating Engineers, AFL-CIO.[1] Case 22-CA-20240(1)

January 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

Upon a charge filed on October 25, 1994, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on November 1, 1994, alleging that the Respondent has violated Section 8(a) (5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 22-RC-10936. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982)). On November 16 and 23, 1994, the Respondent filed an answer and amended answer, respectively, admitting in part and denying in part the allegations in the complaint, and asserting certain affirmative defenses.

---

[1] The name of the Union appears here as set forth in the Decision and Direction of Election and the Certification of Representative issued by the Regional Director in the underlying representation proceeding. Although the complaint and Motion for Summary Judgment substitute "Local 825RH" for "Local 825H," we assume, in the absence of any indication otherwise, that this was an inadvertent clerical error.

On November 22, 1994, the General Counsel filed a Motion for Summary Judgment and memorandum in support thereof. On November 29, 1994, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Thereafter, on December 8, 1994, the General Counsel filed a supplemental memorandum in support of the motion, and on December 22, 1994, the Respondent filed an opposition.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent in its amended answer and opposition admits its refusal to bargain, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding. In addition, the Respondent asserts as an affirmative defense that it has been advised that a majority of the unit employees do not wish to be represented by the Union.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

As for the Respondent's assertion that the Union no longer enjoys majority support in the unit, even if true, this would not justify the Respondent's refusal to recognize and bargain with the Union during the certification year. See *Ray Brooks v. NLRB*, 348 U.S. 96 (1954).

Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times the Respondent, a corporation, with an office and place of business in Moonachie, New Jersey, has been engaged in the manufacture of corrugated products.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations, sold and shipped from its Moonachie, New Jersey facility products, goods, and materials valued in excess of $50,000 directly to points located outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held September 1, 1994, the Union was certified on September 9, 1994, as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by Respondent at its Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional

---

[2] Although the Respondent's amended answer to the complaint denies knowledge or information sufficient to form a belief whether the Union is a 2(5) labor organization, the Decision and Direction of Election indicates that the Respondent stipulated thereto in the underlying representation proceeding. Accordingly, we find that the Respondent is precluded from now litgating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992); and *Wickes Furniture*, 261 NLRB 1062, 1063 fn. 4 (1982).

employees, guards and supervisors as defined in the Act, and all other employees.[3]

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since about October 14, 1994, the Union has requested the Respondent to bargain, and, since about October 17, 1994, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after October 17, 1994, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of the

---

[3] The unit is described here as described in the Decision and Direction of Election and the Certificatin of Representative issued by the Regional Director in the underlying representation proceeding. Although both the complaint and the Motion for Summary Judgment describe the unit somewhat differently, as with the Union's name (see fn. 1, supra), we assume, in the absence of any indication otherwise, that this was an inadvertent clerical error.

selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421, (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, President Container, Inc., Moonachie, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R and 825H, International Union of Operating Engineers, AFL-CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by Respondent in Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) Post at its facility in Moonachie, New Jersey, copies of the

attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing with 20 days from date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. January 9, 1995

William B. Gould IV,	Chairman
James M. Stephens,	Member
Margaret A. Browning,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain with Local Union Nos. 825, 825A, 825B, 825C, 825D, 825R and 825H, International Union of Operating Engineers, AFL-CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by us at our Moonachie, New Jersey facility, but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

PRESIDENT CONTAINER, INC.

FORM NLRB-4279 (2-68)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

RC — RM — RD

PRESIDENT CONTAINER, INC.

Employer

and

LOCAL UNION NOS. 825, 825A, 825B, 825C, 825D, 825R AND 825H INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Petitioner

TYPE OF ELECTION (CHECK ONE)
- ☐ CONSENT
- ☐ STIPULATED
- ☒ RD DIRECTED
- ☐ BOARD DIRECTED

(ALSO CHECK BOX BELOW WHEN APPROPRIATE)
- ☐ 8(b)(7)

CASE 22-RC-10936

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for LOCAL UNION NOS. 825,825A, 825B, 825C, 825D, 825R AND 825H INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

UNIT: All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by the Employer at its Moonachie, New Jersey facility but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

Signed at Newark, New Jersey

On the 9th day of September 1994

William A. Pascarella

Regional Director, Region 22
National Labor Relations Board

EXHIBIT 5

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PRESIDENT CONTAINER, INC.

Employer

and

LOCAL UNION NOS. 825, 825A, 825B, 825C, 825D, 825R AND 825H INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

Petitioner

Case No. 22-RC-10936 | Date Filed 4-11-94

Date Issued September 1, 1994

Type of Election (Check one:)
- ☐ Stipulation
- ☐ Board Direction
- ☐ Consent Agreement
- ☒ RD Direction

Incumbent Union (Code) NONE

(If applicable check either or both:)
- ☐ 8(b) (7)
- ☐ Mail Ballot

GREEN BALLOTS

TALLY OF BALLOTS

The undersigned agent of the Regional Director certifies that the results of the tabulation of ballots cast in the election held in the above case, and concluded on the date indicated above, were as follows:

1. Approximate number of eligible voters 11
2. Number of Void ballots 0
3. Number of Votes cast for PETITIONER 8
4. [redacted] ..... —
5. [redacted] ..... —
6. Number of Votes cast against participating labor organization(s) 2
7. Number of Valid votes counted (sum of 3, 4, 5, and 8) 10
8. Number of Challenged ballots 1
9. Number of Valid votes counted plus challenged ballots (sum of 7 and 8) 11

10. Challenges are (not) sufficient in number to affect the results of the election.

11. A majority of the valid votes counted plus challenged ballots (Item 9) (has) (has not) been cast for LOCAL UNION NOS. 825, 825A, 825B, 825C, 825D, 825R AND 825H INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

For the Regional Director
Region 22

The undersigned acted as authorized observers in the counting and tabulating of ballots indicated above. We hereby certify that the counting and tabulating were fairly and accurately done, that the secrecy of the ballots was maintained, and that the results were as indicated above. We also acknowledge service of this tally.

For EMPLOYER

For PETITIONER

For

For

BEST AVAILABLE COPY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRESIDENT CONTAINER, INC.
Employer

and

Case 22-RC-10936

LOCAL UNION NOS. 825, 825A,
825B, 825C, 825D, 825R and 825H
INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO
Petitioner

ORDER

Employer's and Intervenor Production Workers Union, Local 148, AFL-CIO's Requests for Review of the Acting Regional Director's Decision and Direction of Election are denied as they raise no substantial issues warranting review. In denying review with respect to the argument that the petitioned-for employees should be accreted to the unit represented by the Intervenor, the Board notes, in agreement with the Acting Regional Director, that because such employees have been historically excluded from the unit, they cannot be added by means of accretion. Union Electric Co., 217 NLRB 666, 667 (1975). Employer's and Intervenor's requests to stay the election are also denied.

JAMES M. STEPHENS, MEMBER

DENNIS M. DEVANEY, MEMBER

MARGARET A. BROWNING, MEMBER

Dated, Washington, D.C., August 31, 1994.

R.D. #17-94
Moonachie, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PRESIDENT CONTAINER, INC.

Employer

and Case 22-RC-10936

LOCAL UNION NOS. 825, 825A,
825B, 825C, 825D, 825R and 825H
INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Petitioner 1/

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, 2/ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organizations *(s)* involved claim*(s)* to represent certain employees of the Employer. 3/

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c) (1)* and Section 2*(6)* and *(7)* of the Act. 4/

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9*(b)* of the Act:5/

All full-time and regular part-time maintenance mechanics, boiler men and garage mechanics employed by the Employer at its Moonachie, New Jersey facility but excluding all production employees, office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit*(s)* found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit (*s*) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll.....

OVER

(second side of form is missing)

1/ The name of the Petitioner appears as amended at the hearing.

2/ Briefs filed by the Petitioner and the Intervenor have been duly considered. No other briefs were filed.

3/ Production Workers Union, Local 148, AFL-CIO, herein the Intervenor, was permitted to intervene based upon its purported collective bargaining agreement with the Employer covering the petitioned for unit. The Parties stipulated and, I find, that the Petitioner and the Intervenor are labor organizations within the meaning of the Act.

4/ The Employer is engaged in the manufacture of corrugated boxes at its Moonachie, New Jersey facility, its only facility involved herein. The Petitioner seeks to represent approximately 14 employees in three job classifications, namely, maintenance mechanics, boiler men and garage mechanics. The Employer and the Intervenor assert that their collective bargaining agreement serves as a bar to the petition as it covers these employees together with approximately 220 other production employees. Secondarily, they appear to assert that even if the contract is not a bar, the petitioned for employees should be accreted to the existing unit as they share a community of interest with the represented production employees.

The record reveals that the Employer and the Intervenor have had a collective bargaining relationship since the late 1950s. The most recent collective bargaining agreement, effective from March 10, 1993 to March 9, 1996, defines the unit as "all of its employees, excluding office, clerical, supervisory, foremen, guards and watchmen." This agreement as well as previous agreements do not specifically delineate the classifications of employees included in the unit.

Despite the contention of the Employer and the Intervenor that the petitioned for employees are included in the unit covered by the collective bargaining agreement, the record discloses the contrary. In this regard, the petitioned for employees do not receive contractual wages, increases or bonuses nor are they covered by the contractual health and welfare and pension plans. In this connection, the Employer admits that it never bargained with the Intervenor regarding terms and conditions of employment for these clas-

sifications. The Intervenor's representative admits that the Employer has never considered maintenance mechanics, boiler men, and garage mechanics as part of the unit. The record fully supports this as there is no evidence that the petitioned for employees enjoy contractual terms and conditions of employment. To the contrary the record discloses that the contract was never applied to these employees at any time during the past 20 years.

In these circumstances, noting the lack of any evidence of a collective bargaining history for the petitioned for employees, I find that the asserted contract is not a bar to the processing of the petition. Tri-State Transportation Company, Inc., 179 NLRB 310 (1969).

5/ There remains for consideration the issue as to whether the petitioned for unit is appropriate. The record discloses that the approximately 7 maintenance mechanics primarily repair the Employer's production machinery, as needed. In this regard they have mechanical skills including knowledge of electrical work. They own their own hand tools utilized in their work. They have limited contact with production employees as they repair machines on the production floor. In this connection, they gather information from the production machine operator as to the nature of the problem the production operator has with a particular machine. Production employees do not repair machinery. There is no evidence of any interchange of maintenance mechanics and production employees. Maintenance mechanics also spend substantial time in the Employer's machine shop (an apparently closed off and separate physical area near the production floor) where they use lathes, grinders and milling machines in the repair of production machinery. There is some evidence that one maintenance mechanic, on the third shift, sporadically operated a strapper machine used in production.

The approximately 3 boiler men work in the boiler room and an adjacent room, separated from the production floor. They operate and repair the boiler systems utilized throughout the production process. It appears that they do not have a great deal of contact with production employees. Boiler men are required to have sealed licenses by the State of New Jersey certifying their qualifications. Like maintenance mechanics they own their own hand tools and are not commonly supervised by production supervisors. It appears that

they have separate locker room facilities as do maintenance mechanics. Boiler men do not operate production machinery. There is no evidence of interchange with production employees.

The approximately 3 to 4 garage mechanics work in a separate bay area servicing the Employer's trailers and fork lift machinery. They also own their own small hand tools and are supervised by shipping and receiving department supervisor. They perform no production work and do not operate production machinery. There is no interchange with production employees.

As noted above, maintenance mechanics, boiler men and garage mechanics are not covered by the collective bargaining agreement. They do punch a time clock, like other production employees, and have the same holidays. However, unlike production employees, they have their own health and welfare plan, a separate 401-k plan and appear to have their own separate vacation and sick day policies. Also, they negotiate their own wage rates and increases.

Based upon the above, and the record as a whole, I find that the petitioned for employees share a community of interest among themselves, separate and apart from the production employees, to warrant a determination that they constitute a distinct and appropriate collective bargaining unit. *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962); *Airco, Inc.*, 273 NLRB 348 (1984). In this regard, noting the lack of a history of collective bargaining for these employees, their special skills, their different terms and conditions of employment and the lack of interchange, I find that they cannot be appropriately accreted to the existing bargaining unit represented by the Intervenor.

6/ In view of my finding that the Intervenor's contract with the Employer does not cover the petitioned for unit, I will accord the Intervenor a period of 10 days in which to submit a requisite showing of interest in the unit herein found appropriate in order for it to appear on the ballot.

Supreme Court, U.S.
FILED
MAY 8 1996

(2)

No. 95-1440

In the Supreme Court of the United States

OCTOBER TERM, 1995

PRESIDENT CONTAINER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

19pp

QUESTIONS PRESENTED

1. Whether substantial evidence supports the National Labor Relations Board's findings that:

(a) the Board's "contract bar" rule did not preclude an election in a unit consisting of petitioner's maintenance mechanics, boiler men, and garage mechanics (the mechanics unit);

(b) the mechanics unit was not an accretion to a unit consisting of petitioner's production employees; and

(c) the mechanics unit was an appropriate unit for the purposes of collective bargaining.

2. Whether the Board reasonably concluded that the Union, which had been certified by the Board as the representative of the employees in the mechanics unit, enjoyed an irrebuttable presumption of majority status for one year, and that the year would commence as of the date upon which petitioner began to bargain in good faith with the Union.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

ABF Freight System, Inc. v. *NLRB*, 114 S. Ct. 835 (1994)	13
Brooks v. *NLRB*, 348 U.S. 96 (1954)	5, 6, 7, 11-12, 13
Dodge City of Wauwatosa, Inc., 282 N.L.R.B. 459 (1986)	11
Gould, Inc., 263 N.L.R.B. 442 (1982)	9
Laconia Shoe Co., 215 N.L.R.B. 573 (1974)	8
Laidlaw Waste Systems, Inc. v. *NLRB*, 934 F.2d 898 (7th Cir. 1991)	11
Local 627, Int'l Union of Operating Engineers v. *NLRB*, 595 F.2d 844 (D.C. Cir. 1979)	4
Mar-Jac Poultry Co., 136 N.L.R.B. 785 (1962)	6, 12
Millbrook, Inc., 204 N.L.R.B. 1148 (1973)	3
NLRB v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972)	3
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990)	13
NLRB v. *Security-Columbian Banknote Co.*, 541 F.2d 135 (3d Cir. 1976)	3, 4
NLRB v. *Stevens Ford, Inc.*, 773 F.2d 468 (2d Cir. 1985)	9
Pick-Mt. Laurel Corp. v. *NLRB*, 625 F.2d 476 (3d Cir. 1980)	3
San Jose Motel, 174 N.L.R.B. 1009 (1969)	8

Cases—Continued: Page

South Prairie Constr. Co. v. *Local 627, Int'l Union of Operating Engineers*, 425 U.S. 800 (1976) 11

United Parcel Service, 303 N.L.R.B. 326 (1991), enforced *sub. nom. Teamsters Nat'l United Parcel Service Negotiating Comm.* v. *NLRB*, 17 F.3d 1518 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 722 (1995) 8-9

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951) 8, 10

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

29 U.S.C. 158(a)(1) 5

29 U.S.C. 158(a)(5) 5

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1440

PRESIDENT CONTAINER, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A10) is unpublished, but the judgment is noted at 74 F.3d 1227 (Table). The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. A12-A18) is noted at 315 N.L.R.B. 164. The Acting Regional Director's decision and direction of election in the representation proceeding (Pet. App. A22-A26), and the Board's order denying petitioner's request for review of that decision (Pet. App. A21), are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on December 8, 1995. The petition for a writ of certiorari was filed on March 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures corrugated boxes at a plant in Moonachie, New Jersey. Pet. App. A3. At that facility, petitioner employs approximately 220 production employees (the production unit) and 14 maintenance mechanics, boiler men, and garage mechanics (the mechanics unit). *Id.* at A24. Since the late 1950s, petitioner has had a collective bargaining relationship with Production Workers Union, Local 148, AFL-CIO (Local 148). The most recent collective bargaining agreement between petitioner and Local 148 (the 1993 contract) was in effect from March 10, 1993, through March 9, 1996. The 1993 contract covered a unit consisting of "all of [petitioner's] employees, excluding office, clerical, supervisory, foremen, guards and watchmen." *Id.* at A3.

2. a. In April 1994, Local 825 (and several other locals) of the International Union of Operating Engineers, AFL-CIO (the Union) filed an election petition with the National Labor Relations Board (Board). The Union sought to represent the employees in the mechanics unit. Pet. App. A3, A24. After a hearing, the Board's Acting Regional Director (ARD) directed an election in that unit. *Id.* at A23.

The ARD rejected petitioner's contention that an election in the mechanics unit was barred by the 1993 contract under the Board's "contract bar" rule. Pet.

App. A24-A25.[1] The ARD determined that the employees in the mechanics unit were not covered by the 1993 contract. The ARD based that determination on his findings, *inter alia*, that (1) petitioner admitted that it had never bargained with Local 148 about the terms and conditions of employment of the mechanics unit; (2) Local 148 admitted that petitioner had never considered the mechanics unit to be part of the unit covered by the 1993 contract; and (3) the employees in the mechanics unit did not receive the wages, bonuses, or health and pension benefits prescribed in the 1993 contract. *Ibid.*

The ARD also rejected petitioner's contention that, even if the 1993 contract did not bar the election, no election should be held because the mechanics unit was an accretion to the production unit, which was already represented by Local 148. Pet. App. A26.[2]

---

[1] Under the Board's "contract bar" rule, the Board generally will not conduct an election during the term of an existing collective bargaining agreement of up to three years' duration. See, *e.g.*, *Pick-Mt. Laurel Corp.* v. *NLRB*, 625 F.2d 476, 480 (3d Cir. 1980); see also *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272, 290 n.12 (1972). An existing contract does not, of course, bar an election in a bargaining unit not covered by that contract. *Millbrook, Inc.*, 204 N.L.R.B. 1148, 1148 n.2 (1973).

[2] "[A]n accretion is the incorporation of employees into an already existing larger unit when such a community of interest exists among the entire group that the additional employees have no separate identity. Thus, they are properly governed by the larger group's [previous] choice of bargaining representative." Pet. App. A6 (quoting *NLRB* v. *Security-Columbian Banknote Co.*, 541 F.2d 135, 140 (3d Cir. 1976)). The Board's policy is to strictly limit the application of the accretion doctrine, because employees that are added to an existing bargaining unit are denied a vote on their choice of bargaining repre-

The ARD explained that an accretion was inappropriate in view of "the lack of a history of collective bargaining for [the mechanics unit] employees, their special skills, their different terms and conditions of employment, and their lack of interchange." *Ibid.* Finally, the ARD found that the mechanics unit constituted an appropriate unit for the purposes of collective bargaining, "separate and apart from the production employees." *Ibid.*[3]

b. The Board denied petitioner's request for review of the ARD's decision, concluding that it "raise[d] no substantial issues warranting review." Pet. App. A21. The Board specifically noted its agreement with the ARD that, because the mechanics unit had been "historically excluded" from the unit represented by Local 148, it could not "be added by means of accretion." *Ibid.*

3. On September 1, 1994, the Board conducted an election in the mechanics unit. Pet. App. A4. The Union won the election by a vote of 8 to 2 and, on September 9, 1994, was certified by the Board as the bargaining representative of the employees in that

---

sentative. *NLRB* v. *Security-Columbian Banknote Co.*, *supra*; *Local 627, Int'l Union of Operating Engineers* v. *NLRB*, 595 F.2d 844, 851 (D.C. Cir. 1979).

[3] The ARD found, among other things, that: (1) there was no job interchange between employees in the mechanics unit and the production unit; (2) there was little contact between the employees in the two units; (3) the units were separately supervised; (4) the mechanics unit employees possessed specialized skills and made use of their own hand tools in performing their work; (5) the mechanics unit was not covered by the 1993 contract; and (6) the mechanics unit employees negotiated their own wage rates, had separate health and retirement plans, and were subject to different vacation and sick-leave policies. Pet. App. A25-A26.

unit. *Id.* at A4, A14. On October 14, 1994, the Union asked petitioner to begin bargaining for a contract, but petitioner refused. *Id.* at A4. On October 21, 1994, a majority of the employees in the mechanics unit signed a petition stating that they no longer wished to be represented by the Union. *Ibid.*

On November 1, 1994, the Board's General Counsel issued an unfair labor practice complaint against petitioner, alleging that its refusal to bargain with the Union violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(1) and (5). Pet. App. A4.[4] On the General Counsel's motion, the Board entered summary judgment against petitioner. *Id.* at A12-A18. The Board rejected petitioner's contention that its refusal to bargain with the Union was justified by the employee petition indicating a loss of majority support for the Union a week after the election. *Id.* at A13 (citing *Brooks* v. *NLRB*, 348 U.S. 96 (1954)).[5] To remedy petitioner's unfair

---

[4] Section 8(a) of the Act, 29 U.S.C. 158(a), provides in pertinent part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * *

(5) to refuse to bargain collectively with the representative of his employees, subject to the provisions of section 159(a) of this title.

[5] In *Brooks*, as in this case, the union won a Board-conducted election among the employees of a bargaining unit, but a week after the election, a majority of the employees in the bargaining unit signed a letter stating that they did not wish to be represented by the union. Relying on that letter, the

labor practice, the Board ordered it to bargain with the Union. Pet. App. A16. The Board specified that "we shall construe the initial period of the certification as beginning the date [petitioner] begins to bargain in good faith with the Union." *Ibid.* (citing, *inter alia*, *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962)). Such a remedial order was necessary, the Board explained, "[t]o ensure that the employees are accorded the services of the selected bargaining agent for the period provided by law." Pet. App. A15-A16.

4. The court of appeals enforced the Board's order in an unpublished memorandum opinion. Pet. App. A2-A10. The court upheld the Board's determination that the election in the mechanics unit was not barred by petitioner's 1993 contract with Local 148. The court held that, "[d]espite the facial breadth of the unit set forth in [the 1993 contract], the record supports the Board's conclusion that the mechanics have never been parties to that Agreement." *Id.* at A5. The court also held that the Board's refusal to apply the accretion doctrine to add the mechanics unit to the unit represented by Local 148 was "certainly neither arbitrary nor unreasonable," inasmuch as "the evidence strongly supports the Board's conclusion that the mechanics were in fact excluded from the larger production workers' bargaining unit." *Id.* at

---

employer refused to bargain with the union. 348 U.S. at 97. The Court upheld the Board's conclusion that the employer's refusal to bargain was an unfair labor practice. In doing so, the Court sustained the Board's rule that a certified union ordinarily enjoys an irrebuttable presumption of majority support for one year after its certification, and, accordingly, that such an employee petition does not relieve the employer of its duty to bargain with the union during the certification year. *Id.* at 98-104.

A7. Further, the court upheld, as supported by substantial evidence, the Board's finding that the mechanics unit constituted an appropriate unit for collective bargaining. *Id.* at A9.

The court rejected petitioner's argument that its refusal to bargain with the Union was justified by the employee petition indicating a lack of majority support for the union after the election. Pet. App. A9. That argument, the court explained, was "directly contrary" to this Court's decision in *Brooks* v. *NLRB*, 348 U.S. 96 (1954), which "approv[ed] the Board's rule requiring employers to bargain with a newly certified union for one year." Pet. App. A9. Finally, the court rejected petitioner's challenge to the Board's remedial order. The court explained that the order was "not a penalty" but was instead "the Board's standard remedy to ensure that a newly-certified union receives one year of actual bargaining from the date of its certification." *Id.* at A10. The court observed that, in similar contexts, the Board's remedy "has been approved and enforced by numerous courts." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. a. Petitioner contends (Pet. 10-11) that its 1993 contract with Local 148 barred the election sought by the Union in the mechanics unit. That is so, according to petitioner (Pet. 10), because the "plain language" of the 1993 contract, which purported to cover a unit comprising "all" of petitioner's employees, "cannot be questioned without running afoul of the

'contract bar rule.'" Petitioner misapprehends the rule.

As the court of appeals correctly explained, the Board's contract-bar rule does not preclude an election among employees who are not covered by the existing labor agreement. Pet. App. A5; see note 1, *supra*. Contrary to petitioner's contention, in determining whether the employees at issue are covered by an existing contract, the language of the contract is not always dispositive. Where, as here, the contract has not, in actual practice, been applied by the contracting parties to a group of employees, the contract does not bar an election among them. See, *e.g.*, *San Jose Motel*, 174 N.L.R.B. 1009, 1009-1010 (1969). Although petitioner contends (Pet. 11) that the court misconstrued the evidentiary record in sustaining the Board's finding that petitioner and Local 148 did not, in fact, apply the existing contract to the mechanics unit (see Pet. App. A5, A7, A24-A25), that contention raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. Petitioner also errs in contending (Pet. 12-14) that, even if the employees in the mechanics unit were not covered by the 1993 contract, the Board should have found the mechanics unit to be an accretion to the production unit. The Board has long applied a rule that, "[w]hen a group [of employees] has in fact been excluded for a significant period of time from an existing * * * unit, the Board will not permit their accretion without an election or a showing of majority [support] among them." *Laconia Shoe Co.*, 215 N.L.R.B. 573, 576 (1974); accord *United Parcel Service*, 303 N.L.R.B. 326, 326-327 (1991), enforced *sub nom. Teamsters Nat'l United Parcel*

Service Negotiating Comm. v. *NLRB*, 17 F.3d 1518 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). As the Second Circuit explained in *NLRB* v. *Stevens Ford, Inc.*, 773 F.2d 468, 474 (1985), the Board's rule protects against the risk that, after a group of employees has been excluded from an election in a unit, "strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status."[6]

The Board properly applied its rule in this case to conclude that the employees in the mechanics unit could not be added by accretion to the unit represented by Local 148 because they had been historically excluded from the larger unit. Pet. App. A21.

---

[6] To determine whether a group of employees may be added to an existing bargaining unit under the accretion doctrine, the Board ordinarily applies a community of interest test. That test involves an examination and balancing of such factors as "integration of operations, centralization of managerial and administrative control, geographic proximity, similarity of working conditions, skills and functions, common control of labor relations, collective-bargaining history, and interchange of employees." *Gould, Inc.*, 263 N.L.R.B. 442, 445 (1982). Under the Board's *Laconia Shoe* rule, however, the Board does not apply the community of interest test where, as here, the employees at issue have been historically excluded from the existing bargaining unit. In such circumstances, "[i]t is the fact of historical exclusion that is determinative" of the accretion question. *United Parcel Service*, 303 N.L.R.B. 326, 327 (1991), enforced *sub nom. Teamsters Nat'l United Parcel Service Negotiating Comm.* v. *NLRB*, 17 F.3d 1518 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 722 (1995). Petitioner did not directly challenge the Board's *Laconia Shoe* rule in this proceeding, and petitioner's suggestion (Pet. 12) that the Board should have applied a community of interest test, rather than the *Laconia Shoe* rule, simply misapprehends Board precedent.

Although petitioner contends (Pet. 13) that the court "clearly 'misapprehended or grossly misapplied'" the substantial evidence test in sustaining the Board's finding (see Pet. App. A7), that contention does not merit this Court's attention, for the record belies petitioner's claim. See *id.* at A5, A7, A21, A24-A25.[7]

c. Petitioner further contends (Pet. 15-16) that the Board's determination that the mechanics unit constituted an appropriate unit for the purposes of collective bargaining was "unreasonable and arbitrary." In particular, petitioner asserts (*ibid.*) that "[c]ritically missing from the analysis is substantial evidence that the mechanics share a community of interest, *inter sese*, as opposed to their interest as members of the larger community of employees of [petitioner]." The court of appeals, however, rejected that contention, holding instead that the Board's unit finding was supported by substantial evidence. Pet. App. A9. The court's conclusion raises no issue warranting further review. *Universal Camera Corp.* v. *NLRB*, *supra*.

In any event, the court's assessment of the evidentiary record was correct. As the court explained, that record demonstrated that there were "significant differences in the roles, skills, work conditions and bargaining history between mechanics and production employees" (Pet. App. A7); that, "unlike most produc-

---

[7] Petitioner errs in asserting (Pet. 14) that the Board's accretion ruling represents an unexplained "departure" from the Board's policy of "reject[ing] severance of crafts from a plant-wide unit." The policy to which petitioner refers "addresses the severing of crafts from an existing larger unit which included the craft employees." Pet. App. A9. That policy is inapposite here, for the mechanics unit employees have never been part of the larger unit represented by Local 148. *Id.* at A9, A21.

tion employees, mechanics require prior mechanical skills or experience, use and often purchase their own hand tools, operate [petitioner's] larger machine tools, and wear distinctive uniforms (*id.* at A8); and that "the mechanics * * * share the common function of repairing and maintaining [petitioner's] machinery and equipment [and] share a common bargaining history and similar employment benefits" (*ibid.*). On those facts, the court properly sustained the Board's unit determination. See *South Prairie Constr. Co.* v. *Local 627, Int'l Union of Operating Engineers*, 425 U.S. 800, 805 (1976) ("[T]he selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, if not final, is rarely to be disturbed[.]") (internal quotation marks omitted). Moreover, the Board's unit determination in this case, while highly fact-bound, accords with other Board decisions finding a separate mechanics unit to be appropriate for bargaining. See, *e.g.*, *Dodge City of Wauwatosa, Inc.*, 282 N.L.R.B. 459 (1986) (unit of automobile repair mechanics appropriate, separate from other employees in employer's service department); cf. *Laidlaw Waste Systems, Inc.* v. *NLRB*, 934 F.2d 898 (7th Cir. 1991) (upholding unit of truck drivers, separate from truck mechanics).

2. Contrary to petitioner's contention (Pet. 17-18), the court of appeals correctly relied on *Brooks* v. *NLRB*, 348 U.S. 96 (1954), in holding (Pet. App. A9) that petitioner's refusal to bargain with the Union was not justified by its receipt, one week after the Union won the election, of a petition signed by the majority of the employees in the bargaining unit indicating that they did not wish to be represented by the Union. The Court in *Brooks* came to the same conclusion on virtually identical facts. 348 U.S. at 97-

104; see note 5, *supra*. In doing so, this Court upheld the Board's rule according a conclusive presumption of majority status to a union for the year following its election and its certification.

Petitioner suggests (Pet. 17) that *Brooks* is inapplicable here because its 1993 contract with Local 148 barred an election in the mechanics unit, and that Local 148, rather than the Union, was therefore entitled to the conclusive presumption of majority status. That argument rests on the premise that the 1993 contract covered the mechanics unit, a premise that, as discussed above, was correctly rejected by the Board and the court of appeals. Pet. App. A5, A24-A25; see discussion p. 8, *supra*.

Finally, petitioner contends (Pet. 19) that this Court should modify *Brooks* and the remedial policy enunciated by the Board in *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962), "to exclude from its application a situation where an employer in good faith fails to bargain with a unit, the putative members of which are, *prima facie*, covered by the terms of an existing collective bargaining agreement with another union." That situation, however, is not presented in this case. Petitioner's refusal to bargain with the Union was not grounded on a "good faith" belief that the employees in the mechanics unit were covered by the 1993 contract; rather, as the Board determined in a finding sustained by the court of appeals, petitioner and Local 148 in actual practice did not regard or treat the mechanics unit as subject to the 1993 contract. Pet. App. A5, A7, A24-A25. Moreover, as the court of appeals correctly determined (*id.* at A10), the Board's policy of tolling the one-year period during which petitioner must bargain with the Union until the date it begins to bargain in good faith with the Union does

not unfairly penalize petitioner for obtaining judicial review of the Board's unit determination; rather, it merely insures that a newly-certified union receives one year of actual bargaining after certification. The Board, whose remedial views "merit the greatest deference," *ABF Freight System, Inc.* v. *NLRB*, 114 S. Ct. 835, 839 (1994), acted well within its discretion in adopting that remedial policy. Cf. *Brooks*, 348 U.S. at 104.[8]

---

[8] Petitioner misstates the law in asserting (Pet. 20) that "[a]n employer may refuse to bargain with a certified union when it reasonably believes, in good faith, that the union has lost the majority support of the designated unit." With exceptions not relevant here, a certified union's presumption of majority status is irrebuttable during the certification year. *Brooks* v. *NLRB*, *supra*. It is only *after* the certification year ends that an employer may, in the absence of a collective bargaining agreement, refuse to bargain with a union based on a good faith doubt about the union's majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990). Because petitioner's refusal to bargain occurred during the certification year, the "good faith doubt" defense was unavailable.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

MAY 1996